ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
NO. 85-5348

DAVID BUCHANAN — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

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October Term, 1985

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IN THE
SUPREME COURT OF THE UNITED STATES
NO. 85-5348

DAVID BUCHANAN — PETITIONER

versus

COMMONWEALTH OF KENTUCKY — RESPONDENT

MAY IT PLEASE THE COURT:

JURISDICTION

The jurisdictional facts recited by Petitioner are accepted as correct.

PROCEDURAL HISTORY

Petitioner was indicted March 4, 1982 for the Capital Murder, First Degree Sodomy, First Degree Rape, First Degree Kidnapping (later merged), and First Degree Robbery of Barbel Poore, a 20 year old female gas station attendant. (Record, hereinafter R, pages 1-3). Co-defendant Kevin Stanford was indicted with him for Capital Murder, First Degree Sodomy, First Degree Robbery, and Receiving Stolen Property. (Id.).

At the beginning of their joint trial, Petitioner was exempted from candidacy for the death penalty but Stanford was not. (R 170).

The jury recommended the maximum authorized punishment on all counts, and the trial Judge[1] imposed Petitioner's sentence on September 17, 1982. (R 371-373).

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1. The Honorable Charles M. Leibson, now Justice of the Kentucky Supreme Court.

On June 13, 1985 the Supreme Court of Kentucky unanimously[2] affirmed Petitioner's conviction at 691 S.W.2d 210.

Petitioner's request for writ of certiorari was mailed on August 12, 1985.

OPINION BELOW

In an opinion by Mr. Justice Wintersheimer, the Supreme Court of Kentucky held that:

> (1) "In a joint trial for capital murder where the death penalty is sought against one defendant, but not the other, the impaneling of a death-qualified jury does not deprive the defendant of the right to a trial by a fair and impartial jury selected from a fair cross-section of the community." 691 S.W.2d at 211.
>
> "A death-qualified panel tends to ensure those who serve on the jury to be willing and able to follow the evidence and law rather than their own preconceived attitudes. Such a process furthers the interest of both the defendant and prosecution in presenting the case to an impartial jury." (Id. at 212).
>
> "Persons who are unalterably opposed to capital punishment do not constitute a cognizable group for the purpose of the fair cross-section requirement. Such persons have diverse attitudes which defy classifications and have not been singled out by the public for special treatment. They do not meet the criteria for making a cognizable class." (Id. at 212).
>
> (2) "There is sufficient evidence in the record to support the jury finding that Buchanan intended the death of the victim." (Id. at 212).
>
> (3) "There is sufficient evidence to support the finding by the jury that Buchanan was not acting under extreme emotional disturbance at the time of murder." (Id. at 212).
>
> (4) "The trial judge properly allowed the prosecution to introduce evidence of Buchanan's competency evaluation." (Id. at 213).

2. Mr. Justice Leibson took no part in the decision. 691 S.W.2d at 213.

> "The report which Buchanan contests was cumulative to the DHR[3] letter and report which already had been introduced into evidence. Buchanan opened the door for the introduction of the competency report by introducing only those DHR reports which were beneficial to him." (Id. at 213).
>
> "The evidence of the competency report was nonprejudicial and harmless beyond a reasonable doubt in view of the considerable evidence that the murder was well planned and premeditated. The evidence of the competency report did not affect the outcome of the trial." (Id. at 213).
>
> (5) "The evidence of Buchanan's competency report did not violate his privilege against self-incrimination." (Id. at 213).
>
> "In this case, the report contained no inculpatory statements by Buchanan or any accusatory observation by the examiner who merely recited his observations of Buchanan's outward appearances." (Id. at 213).
>
> "When Dr. Ryan examined Buchanan, he had waived his right to silence by giving the police a confession." (Id. at 213).

COUNTERSTATEMENT OF THE FACTS

Respondent hereby adopts the material facts recited in the opinion below. Additional details are supplied in the following arguments.

ARGUMENT

I.

EXCUSAL OF JURORS WHOSE VIEWS ON CAPITAL PUNISHMENT WOULD PREVENT COMPLIANCE WITH THEIR OATH DOES NOT DEPRIVE A DEFENDANT OF THE RIGHT TO AN IMPARTIAL JURY, DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

Petitioner's right to a fair trial, by jurors drawn from a fair cross-section of the community, does not entitle him to have his guilt or punishment determined by persons unable or unwilling to comply with the oath of juror. The Constitution does not require that a jury mirror the divergent views of the community on

3. Department of Human Resources.

the criminal justice system, much less that it be composed heedless of the veniremen's qualifications for service. The government, like the defendant, has a legitimate interest in having the case decided by jurors who will adhere to the trial Court's instructions. Witherspoon v. Illinois, 391 U.S. 510 (1968) at 522, note 21; Adams v. Texas, 448 U.S. 38, 45, 50 (1980); Wainwright v. Witt, 105 S.Ct. 844, 848 (1985). Thus, the constitution does not forbid the excusal of veniremen already committed to a particular result.

Petitioner cites Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) as his authority that "death-qualifying" the jury excludes a cognizable group contrary to the Sixth Amendment's fair cross-section requirement, and that it renders the panel "conviction-prone" in violation of Due Process under the Fourteenth Amendment. In that case a sharply divided Eighth Circuit Court of Appeals relied upon opinion polls to conclude that respondents with scruples against the death penalty were more likely to acquit than those without such reservations.

Respondent respectfully submits that the evidentiary underpinnings of Grigsby v. Mabry are unreliable for failure to address the threshold question, which is whether an inalterable opponent of the death penalty can follow the law and evidence in a capital trial as genuinely as one whose view on the subject is not so unyielding. The opinion polls relied upon in Grigsby v. Mabry do no more than confirm the obvious fact that a juror predisposed to vote against the death sentence option, but empanelled to determine guilt or innocence in a capital trial, is prone to automatically vote for acquittal so as to foreclose any opportunity for other jurors to consider execution. The absence of any empirical evidence to the contrary is fatal to Petitioner's claim.

In Keenton v. Garrison, 742 F.2d 129, 133 (4th Cir. 1984) the Fourth Circuit Court of Appeals rejected claims similar to those advanced by Petitioner Buchanan:

> Although the right to a jury trial includes the right to a jury venire drawn from a representative cross-section of the community, it does not include the right to be tried by jurors who are unable or unwilling to follow the law and the instructions of the trial judge in a capital case. Lockett v. Ohio, 438 U.S. 586, 596-597, 98 S.Ct. 2954, 2960, 57 L.Ed.2d 973 (1978). The state as well as the defendant has legitimate and vital interests at stake at both the guilt and penalty stages of a capital case.
>
> * * * * *
>
> Furthermore, as the Fifth Circuit reasoned in Spinkellink v. Wainwright, 578 F.2d 582, 597 (5th Cir. 1978), cert. den., 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), members of the venire who are irrevocably opposed to capital punishment would engage in jury nullification if permitted to sit at the guilt stage of a capital case and, therefore, would not be impartial fact finders.

Quoting Smith v. Balkcom, 660 F.2d 573, 579 (5th Cir. 1981), cert.den. 459 U.S. 882, the Court in Keenton v. Garrison, supra, at 134 further noted:

> The guarantee of impartiality cannot mean that the state has a right to present its case to the jury most likely to return a verdict of guilt, nor can it mean that the accused has a right to present his case to the jury most likely to acquit. But the converse is also true. The guarantee cannot mean that the state must present its case to the jury least likely to convict or impose the death penalty, nor that the defense must present its case to the jury least likely to find him innocent or vote for life imprisionment. . . . The logical converse of the proposition that death-qualified jurors are conviction prone is that nondeath-qualified jurors are acquittal prone, not that they are neutral. (Emphasis added).

Petitioner Buchanan has failed to demonstrate that jurors neutral on the death penalty issue are perforce less able or willing to presume innocence, require proof of guilt beyond a

reasonable doubt, or consider the full range of authorized punishment.

He has likewise failed to show that opponents of capital punishment make up a cognizable group which must be represented on the jury in order to satisfy the fair cross-section requirement. Such persons do not comprise a distinctive class any more than do others who favor or are neutral on the death penalty issue. Death penalty opponents have diverse attitudes and characteristics which defy classification, and have not been singled out by the public for special treatment. As such, they do not meet the criteria for distinction as a cognizable group. United States v. Kleifgen, 557 F.2d 1293 (9th Cir. 1977); Brown v. Harris, 666 F.2d 782 (2nd Cir. 1981). In many instances an individual does not even realize his position on the matter unless and until he is summoned for jury service in a capital case, and often times remains uncertain about the subject throughout the voir dire process.

In view of the foregoing, the petition for writ of certiorari should be denied.

II.

THE USE OF A COURT-ORDERED COMPETENCY REPORT TO REBUT MITIGATING EVIDENCE OF EMOTIONAL DISORDER DOES NOT ABRIDGE A DEFENDANT'S PRIVILEGE AGAINST SELF-INCRIMINATION OR RIGHT TO COUNSEL WHERE SILENCE HAD BEEN WAIVED AND COUNSEL WAS UNOPPOSED TO PSYCHIATRIC EXAMINATION.

Petitioner argues that it violated his privilege against self-incrimination and right to counsel for the prosecutor to introduce evidence of a psychiatric report indicating his competence to stand trial. The purpose of introducing such evidence was to refute Petitioner's claim that his alleged emotional disorder should reduce the crime from Murder to Manslaughter.

Petitioner's present counsel, the honorable C. Thomas Hectus, represented him at trial and in the juvenile proceedings which led to his treatment as an adult offender. (Transcript of November 9, 1981 Hearing, page 27). After Petitioner was evaluated during the juvenile proceedings in District Court, Mr. Hectus obtained an order from the Circuit Court requiring further psychiatric examination. (Transcript of November 20, 1981 Hearing, pages 11-17). It is only the initial psychiatric report that Petitioner complains about here.

For several reasons, the introduction of this evidence did not offend the Constitution. First, as noted at 691 S.W.2d 213 of the opinion below, Petitioner had voluntarily waived his privilege of silence in a confession which preceded the subject competency report.

Second, as noted hereinabove, it appears that Petitioner's counsel had notice prior to the initial examination.

Finally, as noted in the opinion below, Id., the evidence was nonprejudicial and could not have contributed to Petitioner's conviction or penalty.

Petitioner's authority of Estelle v. Smith, 451 U.S. 454 (1981) is readily distinguishable on its facts. In that case the defendant received no warnings, his counsel received no notice, and the psychiatrist's testimony could fairly be described as accusatory. By contrast, not only had Petitioner Buchanan been warned to remain silent, and his counsel notified prior to the examination, but the report contained no inculpatory statements or any accusatory observations by the psychiatrist. (Evidence, pages 1143-1144). The psychiatrist here did no more than record his observations of Petitioner's outward appearance. This evidence certainly was less prejudicial, if at all, than the prior treatment reports introduced by Petitioner himself. (Id. at 1124).

CONCLUSION

WHEREFORE, Respondent Commonwealth of Kentucky respectfully requests the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that two copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari has been served by United States Mail, first class postage prepaid, to Hon. C. Thomas Hectus, Gittleman and Barber, 635 West Main Street, Louisville, KY 40202 on this the 1st day of November, 1985.

David A. Smith
Assistant Attorney General

A P P E N D I X

THE COMMONWEALTH OF KENTUCKY

Jefferson Circuit Court, Criminal Division

82CR0406-3

MARCH Term A. D., 19 82

THE COMMONWEALTH OF KENTUCKY

Against

KEVIN STANFORD

DAVID BUCHANAN

1-MURDER (BOTH)
KRS 507.020 Capital Offense
Death or 20 years to Life

2-ROBBERY I (BOTH)
KRS 515.020 Class B Felony
10 to 20 years

COMPLICITY
KRS 502.020

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT ONE

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendants, Kevin Stanford and David Buchanan, acting alone or in concert with another, committed the capital offense of murder by intentionally or wantonly causing the death of Baerbel Poore by shooting her with a pistol.

COUNT TWO

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendants, Kevin Stanford and David Buchanan, acting alone or in concert with another, committed first-degree robbery by threatening the use of physical force upon Baerbel Poore, while armed with a pistol, and in the course of committing a theft at the Checkers Oil Station.

THE COMMONWEALTH OF KENTUCKY

Jefferson Circuit Court, Criminal Division

82CR0406

MARCH Term A. D., 19 82

THE COMMONWEALTH OF KENTUCKY

Against

KEVIN STANFORD

DAVID BUCHANAN

3- RAPE I (BUCHANAN)
KRS 510.040 Class B Felony
10 to 20 years

4- SODOMY I (BOTH)
KRS 510.070 Class B Felony
10 to 20 years

PAGE TWO

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT THREE

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendant, David Buchanan committed first-degree rape by engaging in sexual intercourse with Baerbel Poore, through the use of forcible compulsion.

COUNT FOUR

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendants, Kevin Stanford and David Buchanan, acting alone or in concert with another, committed first-degree sodomy by engaging in deviate sexual intercourse with Baerbel Poore, through the use of forcible compulsion.

THE COMMONWEALTH OF KENTUCKY

Jefferson Circuit Court, Criminal Division

82CR0406

MARCH Term A. D., 19 82

THE COMMONWEALTH OF KENTUCKY

Against

KEVIN STANFORD

DAVID BUCHANAN

5- RECEIVING STOLEN PROPERTY OVER $100
KRS 514.110 Class D Felony
1 to 5 years (Stanford only)

6- KIDNAPPING (Buchanan only)
KRS 509.040 Class B Felony
10 to 20 years

PAGE THREE

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT FIVE

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendant, Kevin Stanford, committed the offense of receiving stolen property by having in his possession property, of the value of $100 or more, that had been stolen from the Checker Oil Station.

COUNT SIX

That on or about the 7th day of January, 1981, in Jefferson County, Kentucky, the above-named Defendant, David Buchanan, committed the offense of kidnapping when he unlawfully restrained Baerbel Poore against her will, with intent to advance the commission of a felony, to-wit: a murder.

AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY.

all counts A TRUE BILL

March 4 82

[redacted] FOREMAN

Jeanne Tucker

NO. 82-CR-0406

JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS.

ORDER

DAVID BUCHANAN — DEFENDANT

* * * * *

Upon motion of the defendant, and the Court being sufficiently advised,

IT IS HEREBY ORDERED that the capital portion of the indictment herein, be, and it hereby so, dismissed. It is further ordered that Count 1 (murder) be prosecuted as a Class A Felony.

Comm. Has No Objection

Charles M. Leibson [signature]

HON. CHARLES LEIBSON, JUDGE
JEFFERSON CIRCUIT COURT
DIVISION NINE (9)

DATE: ____________________

Clerk - Hold entering This order - I want Hearing tomorrow on whether only evid. is That Buchanan non-triggerman - Johnson [?] What is The state of Proof as to circumstances of the shooting??

7/30 [?] Hearing Held - [illegible] conceded by Com Atty that death penalty would be unconstitutional [?] [illegible] Buchanan [illegible]

JUL 2 ? 1982
PAUL C. MILLER, Clerk
By [signature] Deputy Clerk

NO. 81 CR 1218
82 CR 0406

JEFFERSON CIRCUIT COURT
NINTH DIVISION

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS

FINAL JUDGMENT

DAVID BUCHANAN — DEFENDANT

The defendant at arraingment at arraignement having entered a plea of not guilty to the following charges included within the indictment; Count 1, Murder, Count 2, Robbery I, Count 3, Rape I and Count 4, Sodomy I and having on the 2nd day of August, 1982,, appeared in open court with his attorney the case was tried before a jury which returned the following verdict on the 12th day of August, 1982: VERDICT NO. 2, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF MURDER UNDER INSTRUCTION NO. 1 AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR LIFE (TO BE SERVED CONSECUTIVELY WITH ANY OTHER SENTENCE). /S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 12, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF ROBBERY IN THE FIRST DEGREE UNDER INSTRUCTION NO. VI AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS (TO BE SERVED CONSECUTIVELY). /S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 14, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF RAPE THE FIRST DEGREE UNDER INSTRUCTION NO. VII AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS (TO BE SERVED CONSECUTIVELY). /S/ CHARLES B. CORNISH, FOREMAN. VERDICT NO. 16, WE, THE JURY, FIND THE DEFENDANT, DAVID BUCHANAN, GUILTY OF SODOMY IN THE FIRST DEGREE UNDER INSTRUCTION NO. VIII AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR 20 YEARS (TO BE SERVED CONSECUTIVELY). /S/ CHARLES B. CORNISH, FOREMAN.

On the 14th day of September, 1982, the defendant appeared in open court with his attorney, Tom Hectus, and the court inquired of the defendant and his counsel whether they had a legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel the opportunity to make statements in the defendant's behalf

and to present any information in mitigation of punishment, and the court having informed the defendant and his counsel of the factual contents and conclusions contained in the written report of the presentence investigation prepared by the Division of Probation and Parole, the Defendant agreed with the factual contents of said report with the exceptional of the statment made in regards to a kitchen knife being found in the juvenile center under a toilet seat. The statement made was that the defendant placed the kitchen knife there. The defendant denies that statement.

Having given due consideration to the written report of the Division of Probation and Parole, and to the nature and circumstances of the crime, and to the history, character and condition of the defendant, the court is of the opinion that imprisonment is necessary for the protection of the public because:

A. there is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge.

B. the defendant is in the need of correctional treatment that can be provided most effectively by the defendant's commitment to a correctional institution.

C. probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime.

D. the defendant is not eligible for probation or conditional discharge because of the applicability of KRS 533.060.

No sufficient cause having been shown why judgment should not be pronounced, IT IS ORDERED AND ADJUDGED BY THE COURT that the defendant is guilty of Murder, Robbery I, Rape I and Sodomy I and is sentenced to Life on Murder, 20 Years on Robbery I, 20 Years on Rape I and 20 Years on Sodomy I. The sentences of 20 years on Robbery I, Rape I and Sodomy I are to run consecutive with each other for a total of 60 years but to run concurrent with the Life sentence for a total of Life in the Bureau of Corrections.

IT IS FURTHER ORDERED that the sheriff of Jefferson County deliver the defendant to the custody of the Department of Corrections at such location within this Commonwealth as the Department shall designate.

IT IS FURTHER ORDERED that the defendant is hereby credited with time spent in custody prior to sentence, namely 607 days as certified by the jailer of Jefferson County towards service of the maximum term of imprisonment.

After imposing sentence, the court informed the defendant that he has a right to appeal with the assistance of counsel; that if he is financially unable to afford an appeal, a record will be prepared for him at public expense and counsel will be appointed to represent him; that an appeal must be taken within 10 days of the date of judgment, and that the clerk of the court will prepare and file a notice of appeal for him within that time if he so requests. Pending appeal, the defendant is remanded to custody.

Charles M. Leibson

CHARLES M. LEIBSON, JUDGE

ATTESTED: A TRUE COPY

PAULIE MILLER, CLERK

BY Debbie Moore D.C.

CC: ERNEST JASMIN
THOMAS HECTUS

SEP 17 1982

PAULIE MILLER, Clerk

By [illegible]
Deputy Clerk

your Honor.

THE COURT: How about you, Mr. Hectus, on behalf of Mr. Buchanan, do you need a formal reading of the Indictment or advising of his rights?

MR. HECTUS: Judge, I don't believe so. I've represented Mr. Buchanan since the inception of the case in Juvenile Court and I think he understands, at this point, his rights.

THE COURT: First of all, with reference to you, Mr. Stanford, through your counsel, how do wish to plead?

MR. JEWELL: Not guilty.

THE COURT: This is a five count Indictment.

MR. JEWELL: Yes, sir.

THE COURT: The last count of that Indictment has been withdrawn or not bill was passed and I've drawn an 'X' through that to avoid some of the confusion, that's Count 6. Count 1, is the charge of murder, against both of these defendants. Count 2, is a charge of first degree robbery, against both of these defendants. Count 3, is a charge of first degree rape, against David Buchanan. Count 4, is a charge of first degree sodomy, against both, Kevin Stanford and David Buchanan. Count 5, is a charge of receiving stolen property against Kevin Stanford, only. I assume that all of these counts, since they appear to arise out of

on this particular defendant. The possibility of future acts, criminal acts committed by him.

MR. HECTUS: Judge, that is a fact. Psychologist did recommend David be held in an institution where he can be suitably treated. I'll withdraw my motion for bond if the Commonwealth is willing to transfer Mr. Buchanan to a psychiatric facility for treatment pending trial.

MR. WINE: Your Honor the Commonwealth feels that, right now, the conditions of confinement are much too lax and would not agree, at this time, unless there was a hearing or a Court order that he would be transferred anywhere from the Juvenile Detention Center.

THE COURT: Is there an institution that's equiped to treat somebody who's being held in these circumstances? I'm under the impression that the section of the Seven Counties or whatever it is, region...

MR. HECTUS: Cromin.

THE COURT: The Cromin Region does not accept people who are...

MR. WINE: That's correct, your Honor.

THE COURT: That have to be held under guard at the present time.

MR. HECTUS: No, sir. They have been tranferred to Luther Luckett, it's my understanding.

THE COURT: Luther Luckett is up there at the...

MR. HECTUS Your Honor, the Gromin unit is now in Luther Luckett as opposed to when it was in Anchorage. It used to be in Anchorage.

THE COURT. Yes. There's nothing in Anchorage. There's is, now, a facility on the grounds of the Kentucky State Reformatory called Luther Luckett Facility which has a ward to treat people with serious mental illness. Well, can we, by agreed order, provide that this individual, Buchanan, will be held without bond in the Luther Luckett Institution where he will be available for treatment and where, at the same time, all of these concerns that Mr. Wine has, which are either real or imagined without deciding whether they are, would be obviated?

MR. WINE. Judge, my only concern is not knowing the security measures available at the Luther Luckett Center.

THE COURT. Inside the grounds of the Kentucky State Reformatory, I assume that they have adequate security measures to hold a person inside the grounds of the Kentucky State Reformatory. I don't know how you could be anymore incarcerated in the local jail than you are in the Kentucky State Reformatory.

MR. HECTUS: Judge, if I may, while Mr. Wine is thinking about this, at the moment, I think in terms of motions that will be made in this Court, the cart is getting in front of the horse right now, Judge, because I had intended on making motions for psychatric evaluation, which I assume can be made at Luther Luckett.

THE COURT. I would think that we can put all of this ball of wax into one thing and expidite this trial.

MR. HECTUS: The problem being this, Judge...

THE COURT: It seems to be that we've come upon a solution that's for the benefit for both sides.

MR. HECTUS. Well, the problem being this, Judge, and I may not have any objection depending upon how the Court rules.

THE COURT: Well, I'm going to give you a psychatric evaluation.

MR. HECTUS: Yes sir. My motion would have been, though, that with my client being an indigent, I feel like had he had the means for me to go out and hire a private psychatrist or a private psychologist, I could have that person go to the detention center, where David is now, have David tested and have that report made only available to me until such time as I decided

to use it and reveal it to the Commonwealth at that time, so that they can prepare. However, should that report not be favorable, I feel like I would have no obligation whatsoever to turn it over to the Commonwealth, if it was work in preparation for the defense. If he goes to Luther Luckett, I have no objection to any evaluations that are made out there as long as I get to review them and decide whether or not they're going to be used in his defense; because, obviously, he's going to have to give up his fifth amendment right to remain silent in talking to a psychiatrist or a psychologist.

THE COURT: Counsel, you were doing great with me until just that last thing. You're mixing oranges and apples right now. You're suggesting that I should follow the views expressed in a report that's been filed that your client needs, as a juvenile, psychiatric treatment.

MR. HECTUS: Yes, sir.

THE COURT: All right, now, the fact that he goes to Luther Luckett, I'm hopeful they will give him those treatments.

MR. HECTUS: Yes, sir.

THE COURT: If that includes the development of information which is helpful to either you or the Commonwealth, I have nothing to do with that and it's really irrelevant to the issue that's involved here. I would, if you wish, provide in any order, that he will

not be questioned about this offense while he is there so that he won't be pressed to give any information that would be incriminatory about the crime; but I would not give an order that would, in any way, impede other treatment. That is, that would be the only reason for sending him there so that he could be getting treatment; and, therefore it might, and I don't know that this is a detriment to you, but, it might develop in the fact that mental status being determined, to the effect that he is of sufficient mental status to stand trial.

MR. HECTUS: Yes, sir.

THE COURT: It could develop the other way around. But, on the separate issue of... in other words, I would include in the order that he cannot be questioned about the particular occurence. I don't see why that has to be necessary to his treatment.

MR. HECTUS: Well, yes, sir, that was one of my concerns, Judge, and a recent United States Supreme Court case, they reversed the death sentence for that reason.

THE COURT: I'm not going to put you in the position where you're client will be forced to give evidence that might incriminate him. That's the choice you have to made whether there's any questions about a psychiatrist on that ground but, I certainly would not waste the facility of the psychological center by sending him there and then saying that he shouldn't be

in any other way. I think he should be. I think, if you're going to act in the best interest of your client, that this is something that both sides will agree to and we're all showing a rather statesmen like attitude about the situation.

MR. HECTUS: The last problem is, I'm going to have to consult with my client, Judge, because I feel that he's been waived that he may have a right to bail and I don't feel like I can waive that, if he wants to, that's fine.

THE COURT: All right. Go in there and talk to him about that and see what he says.

MR. VIME: Judge, it would be an agreed order then?

THE COURT: That he be confined without bail at Luther Luckett Facility at the Kentucky State Reformatory for the purpose of treatment; but, that he would not be questioned regarding the circumstances of the offenses which are charged against him. I think it satisfies your concerns and it satisfies the other side's concerns.

MR. VIME: I believe it does, your Honor.

THE COURT: Let's hope that he accepts it.

(WHEREUPON, Mr. Hectus left the courtroom for a conference with his client, David Buchanan, and returned. Court continued as follows:)

THE COURT: All right, Court will come to order. Do we need to get your client in here for this?

MR. HECTUS: I don't think so, Judge, as long as the terms are understood that it's for treatment and as far as any evaluation or, I think that should be left for a later motion.

THE COURT: I dictated the order.

MR. HECTUS: That's fine.

THE COURT: You just need to show that it's an agreed order and type it up and I will sign it. I've already dictated it, what do you want, it read back?

MR. HECTUS: Well, yeah, I'd like to know what it says.

THE COURT: All right, read back what I said.

THE COURT REPORTER: (Reading back the Court's order) That he be confined without bail at Luther Luckett Facility at the Kentucky State Reformatory for the purpose of treatment; but, that he would not be questioned the circumstances of the offenses which are charged against him. I think that satisfies your concerns...

THE COURT: That's all, just the order and that's what I want you to type up.

THE COURT REPORTER: Okay.

THE COURT: Just say by agreed order.

A August 17th, 1981.

3496 Q And, that was a psychiatric report that you received, ma'am?

A Yes.

3497 Q Leaving out the portion that was indicated by the Judge, will you read what that report says, ma'am?

A (Witness reading report:) Mental Status Exam regarding David Buchanan. Mr. Buchanan is a 17 year old black male seen on 8-14-81 at the youth center for approximately a period of one hour at the request of Judge Fitzgerald. David's past records were reviewed at DHR Offices in the Legal Arts Building prior to this interview. At the initiation, David was slightly aprehensive about why I was there but the explanation offered seemed to delay his anxiety and he was relaxed. Rapport was reasonably good and eye contact was adequate and David was appropriate inneractionally in the context of the setting. He was neither especially hostile or friendly, mainly tolerant and cooperative. The discussion focused on the hear and now since goal was to ascertain meeting of the 202A criteria or not. He was in good reality contact and reasonable knowledge of current events outside the center and seemed to be functioning in full normal I.Q. range. Short and long term memory appeared intact. There was not evidence of hallucinations or delusions. Affects was...affect was generally shallow without imporia

or disporia. He seemed somewhat optimistic about the outcome of the charges pending against him. No suicidal obviation is present, although, David states at times he has been very angry at certain people, staff at the center and thought about hurting them. David was not especially anxious or restless except initially and seemed overall relaxed. And, it's signed by Robert Ryan, M.D.

3498 Q Does that complete, ma'am?

A Yes.

3499 Q Are there any other later psychological or psychiatric reports subsequent to that one of August 21st, ma'am?

A No.

3500 Q All right. Thank you very much, ma'an.

MR. JASMIN: I have no further questions.

MR. HECTUS: Judge, I have a couple of questions on re-direct.

THE COURT: All right.

REDIRECT EXAMINATION

QUESTIONS BY MR. HECTUS:

3501 Q Miss Elam, at the time of that report, David had been in custody at the detention center for some seven months, had he not?

A Yes.

Short term auditory and visual memory skills are impaired. David has extremely limited capacity for insight. Judgment is impaired. Inneractions with peers is likely to be extremely superficial and very guarded. David uses the psychological defense and projection, denial of rationalization and isolation extensively. He will be easily lead by other more sophicated delinquents or youths. He has very little inner personal skills and is likely to be seen by other youth as a pawn to be used. David's human figure drawings are extremely bazaar. Combined with his flat affect and depressed mood, as well as, other suggestions of a cognity (inaudible) order, it is felt that this individual has potential for developing a full-blown schizophrenic disorder. At the present time, at least, he is extremely mistrustful, suspicious and even paranoid. He is in need of on going extensive mental health intervention in addition to a highly structured but minimally stressful, from a psychological point view, residential environment. In view of the presence of extreme unmet dependency need, early sustained frustration and minimal success in almost any endeavor, there exists the strong probability that underlying considerable passitivity and withdrawal is extensive anger and perhaps even rage. Thus, under the proper circumstance, David could be expected to be dangerous with respect to acts against other persons. While this